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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-963

DRAVO CORPORATION, S. J. GROVES & SONS CORPORATION and GUST K. NEWBERG CONSTRUCTION CO.,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM J. SCOTT, ATTORNEY GENERAL, DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS and BARNEY J. GRABIEC, DIRECTOR OF THE DEPARTMENT OF LABOR OF THE STATE OF ILLINOIS,

Respondents,

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

This brief in opposition to petitioners' request for a writ of certiorari is written upon order of this Court.

(A) Prefatory Remarks.

Petitioners' brief conveys a totally erroneous impression which, upon proper analysis, finds no basis in the factual posture of the case as presented in the Illinois courts. Petitioners attempt to draw in their brief a picture of a taxpayer badgered and harassed by the governmental taxing machines of Illinois and Kentucky, each of them forcing the taxpayer to pay taxes for activities conducted by him on the same property that gives rise to the tax liability. This simply is not so. Rather the case presents the question whether the State of Illinois and its agencies may properly invoke the jurisdiction of their courts to have the liability of companies for payment of Illinois taxes and the obligation of these companies to abide by applicable Illinois laws established in their courts if that liability and obligation arise from work performed by the companies on certain land which the companies claim lies in another state. The obvious answer to this question must be in the affirmative, and the Illinois Appellate Court against whose decision the certiorari petition is directed has so held. Were it otherwise, a State, such as Illinois, acting through its courts, would be deprived of the power to determine whether a piece of land lies within its territory, and, therefore, is subject to its laws; if the State could not proceed in such manner, it would lose its judicial power and consequently one of the most basic attributes of its sovereignty in every case in which it asserts its authority over a lot of real estate and the defendant claims that the lot in question lies in another state. Loss of jurisdictional power in such an instance would be rank

absurdity. Yet, this is precisely what petitioners attempt to accomplish. No violation of due process is involved, even with the contrived addition by petitioners of facts not contained in the record.

Thus, petitioners, on page eight (footnote 2) of their petition, allege that they made some payments of Kentucky taxes "during the pendencey [sic] of the Illinois proceedings" and then withheld such payments after the decision of the Illinois Supreme Court which denied petitioners leave to appeal. They also allege that the State of Kentucky has begun proceedings to collect taxes from petitioners.

There is no support whatsoever in the record for these alleged "facts" nor is there any reference made to any place in the record or Appendix, bearing out these averments. Hence any mentioning of these "facts" is, to say the least, highly improper.

It should also be emphasized that petitioners never stated in the proceedings before the Illinois courts that they paid any taxes to Kentucky. As a matter of fact, the letters attached by petitioners-defendants to their motion to dismiss respondents-plaintiffs' complaint, which letters purportedly showed that Kentucky had claimed taxes from petitioners, "were dated almost a month after the filing of the complaint." (Opinion of Ill. App. Court, Petitioners' Br. 23).

Yet, even if petitioners had paid such taxes to Kentucky after the Illinois proceedings had been instituted and were pending, this was done on their own volition, and they cannot by this device establish for themselves the sovereignty of a State over a piece of land and defeat the jurisdiction of the Illinois courts to determine whether that land which gives rise to tax liability is located within the territorial limits of Illinois. This holds particularly true in the pres-

ent case where the boundary as such between Illinois and Kentucky is not in dispute; that boundary extends to a line representing the lower water mark on the northwest shore of the Ohio River.

(B) The Facts.

In August 1971, respondents filed a complaint for a declaratory judgment against petitioners in the Circuit Court of Pope County, Illinois. The complaint alleged that the petitioners were engaged in construction and other work on so-called Dog Island in the Ohio River near Hamletsburg in Pope County, Illinois. The complaint also alleged that Dog Island was within Illinois' territorial limits according to the location of the Illinois-Kentucky boundary line in the Ohio River.

Respondents' complaint asked the court to declare that Dog Island was within Illinois' territorial limits and that petitioners were required to comply with Illinois' Income Tax and Unemployment Compensation statutes, as well as other applicable Illinois laws.

Petitioners moved to dismiss the complaint, averring, among other things, that Kentucky had claimed Dog Island to be within Kentucky's territorial jurisdiction and that petitioners were alleged to be liable for certain Kentucky taxes. Two letters from Kentucky officials, dated almost a month after the filing of the complaint, were submitted as sole evidence of Kentucky's alleged claims.

Petitioners' motion to dismiss alleged, in pertinent part, that (a) the dispute was between Illinois and Kentucky and therefore within the exclusive jurisdiction of the United States Supreme Court, and (b) since a decision by the trial court could not bar proceedings by Kentucky in its own courts it would be a denial of petitioners' Fourteenth Amendment rights for the trial court to maintain juris-

diction. The Circuit Court, without going into the merits of the case, summarily dismissed the comlaint on due process grounds, as quoted on pg. 4 of the petition.

The Illinois Appellate Court for the Fifth District reversed and remanded, holding that the trial court should determine in what state Dog Island was located. The Appellate Court also rejected petitioners' due process contentions under the posture of the case as presented to it.

The Supreme Court of Illinois denied petitioners leave to appeal. Petition for a writ of certiorari was docketed in this Court on December 21, 1973.

QUESTIONS PRESENTED

1. Is a writ of certiorari for alleged deprivation of property in violation of due process proper and justified if the writ is based upon the conjecture that petitioner might be subjected to double taxation by two states but no final judgment has been rendered by the state court, against which the certiorari petition is directed, that tax liability will be imposed upon petitioner, and the imposition of such tax liability is presently uncertain and will have to await a trial on the merits?

2. May a state invoke the jurisdiction of its courts to have the liability of certain companies for the payment of state taxes determined by these courts if that liability arises from work performed by the companies on land claimed by the companies to lie in an adjacent state, and does the mere invoking of such jurisdiction deprive the companies of due process of law simply because the state courts may ultimately, upon a trial on the merits, determine that the land constituting the source of the alleged tax liability, does lie in the state which has invoked the jurisdiction of its courts?

ARGUMENT

I.

THE CAUSE IS NOT WITHIN THE CERTIORARI JURISDICTION OF THIS COURT SINCE THE ORDER OF THE ILLINOIS APPELLATE COURT IS NOT A FINAL ORDER WITHIN THE PROVISIONS OF 28 USC § 1257(3).

The decision of the Illinois Appellate Court against which the petition for certiorari is directed merely determined whether it was proper for the trial court to summarily dismiss respondents' complaint upon petitioners' motion to dismiss the action. In its order, the Illinois Appellate Court reversed the decision of the lower court and remanded the case for trial.

No trial was ever held on the merits of this case; thus, there is no final decision determining whether Dog Island is within the territorial jurisdiction of Illinois and whether petitioners are liable for Illinois taxes and in what amount.

The jurisdiction of this Court in certiorari matters emanating from State courts is narrowly defined by the pertinent statute, 28 USC § 1257(3). The granting of writs of certiorari is limited to cases involving "final judgments or decrees rendered by the highest court of a state in which a decision could be had. . . ." Since no final judgment on the merits was granted in this case, it does not fall within this Court's certiorari jurisdiction and, therefore, is not a properly cognizable controversy ripe for adjudication by this Court.

This Court has long held that a judgment or decree of the highest court of a state, reversing an inferior court and remanding the case to the lower court for trial or

for further proceedings consistent with the judgment of the reviewing court, is not a final judgment and will not be reviewed by this Court.

Thus, as early as 1827, this Court held in *Winn* v. *Jackson*, 25 U.S. (12 Wheat) 135 (1827), that a state court judgment, which had sustained the validity of a state statute against the contention that it was repugnant to the United States Constitution and reversed the decision of the lower court, was not a final judgment within the meaning of the Judiciary Act of 1789, when the state reviewing court had remanded the case to the lower court for further proceedings.

In *Bostwick* v. *Brinkerhoff*, 106 U.S. 3 (1882), this Court found that the jurisdictional requirement of finality of the highest state court judgment meant that the state court judgment must terminate the litigation between the parties on the merits so that, if this Court should affirm the decision, the state trial court would have nothing to do but execute the judgment or decree.

In *Louisiana Nav. Co.* v. *Oyster Commission*, 226 U.S. 99, 57 L.ed. 138, 33 S.Ct. 78 (1912), the Louisiana Supreme Court had reversed a judgment of the trial court which had dismissed plaintiff's petition involving so-called slander of title of plaintiff to described lands, because the petition failed to state a cause of action. The Louisiana Supreme Court was of the opinion that plaintiff should again be afforded an opportunity to amend its petition and remanded the case to the trial court for the indicated purpose. This Court refused to consider the case upon a writ of error which had alleged the existence of federal questions within the cognizance of this Court, and dismissed the case for want of jurisdiction. In doing so this Court pointed out that petitioner had contended that the judgment below was final for the purpose of review by this

Court because the Louisiana Supreme Court practically had finally disposed adversely to plaintiff's title to a substantial part of the lands involved in the suit, hence that the Louisiana Supreme Court, in remanding the cause for further proceedings, had done so only as to other lands. This Court rejected petitioner's contention and declared that it may not be called upon "to review by piecemeal the action of a state court which otherwise would be within its jurisdiction," and, moreover, that, on the question of finality, the form of the judgment of state courts was controlling (226 U.S. 99 at 101, 57 L.ed. 138 at 140).

The *Louisiana Nav. Co.* decision was cited with approval in *Urie* v. *Thompson*, 337 U.S. 163 at 172, 173, 93 L.ed. 1282 at 1294, 69 S.Ct. 1018 (1949) on the point that this Court will exercise jurisdiction only if the state court judgments are final.

See also *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 59 L.ed. 1027, 35 S.Ct. 625 (1915), and *Cohen* v. *New York*, 385 U.S. 976, 17 L.ed. 2d 438, 87 S.Ct. 505 (1966), in which this Court refused to grant a writ of certiorari to the Court of Appeals of New York for want of a final judgment in an instance in which the New York trial court had granted petitioners' motion to suppress certain evidence; the state had appealed, the Appellate Division reversed, and the Court of Appeals had affirmed the decision of the Appellate Division (219 N.E. 2d 427).

It must be reiterated that, under the posture of the case as presented to this Court, no final decision of a state court was rendered in the instant case. Since the trial court dismissed the complaint upon petitioners' motion, before an answer had been filed and the issues joined, and the case was remanded by the Appellate Court to the trial court for further proceedings, there is at present no certainty as to the final determination of this matter by the

trial court. Respondents-plaintiffs might never be able to prove that the disputed land was located within the boundaries of the State of Illinois; hence petitioners might never be liable to pay any taxes to the State of Illinois. Yet, that being the case, how could it possibly be argued that petitioners will be deprived of due process of law if the Illinois proceedings continue? Admittedly, for the time being, petitioners do not pay any taxes relating to their activities, either to Illinois or to Kentucky, having in the meantime successfully played off one state against the other. Since it is, as repeatedly emphasized, at the present time totally uncertain whether they ever will be found liable for the payment of any Illinois taxes, petitioners' request for the exercise of jurisdiction by this Court is based solely upon conjecture. Under these circumstances the matter is not ripe for determination by this Court, and a granting of a writ of certiorari would be a speculative exercise in legal futility.

II.

THE DECISION OF THE ILLINOIS APPELLATE COURT DOES NOT VIOLATE PETITIONERS' RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A.

Petitioners' Reference to Alleged Facts Not Contained in the Record Is Improper.

Petitioners, in their argument, assert on pg. eight (footnote 2) of their petition that they have paid Kentucky taxes during the "pendencey" [sic] of the Illinois proceedings and that the State of Kentucky has begun judicial proceedings against petitioners for the enforcement of taxes claimed by Kentucky.

Respondents strongly object to the inclusion of these alleged "facts" in the petition since they appear nowhere in the record. In *Hedgebeth* v. *State of North Carolina*, 334 U.S. 806 at 807, 92 L.ed. 1739 at 1740, 68 S.Ct. 727 (1948), it was declared that, in reviewing a judgment of a state court, this Court will be bound by the record on which the judgment was based. In *Henneford* v. *Northern Pacific Railroad Co.*, 303 U.S. 17 (1938), in which appellee tried to submit information not in the record on the amount of a tax he had paid, this Court disregarded the proffered information, decided the case on the record alone and dismissed the cause for want of jurisdiction. In *Standard Vacuum Oil Co.* v. *United States*, 339 U.S. 157, 94 L.ed. 731, 70 S.Ct. 545 (1950), this Court was urged to consider facts not in the record; it said (339 U.S. 157 at 160, 94 L.ed. 731 at 733, 734): "But we cannot consider such allegations in determining the sufficiency of the cause stated. After all, pleadings and the making of a proper record have not been dispensed with. They still have a function to perform. This case points up that function. We will not review questions not clearly raised in the record."

Thus, petitioners' alleged facts of any enforcement proceedings commenced by Kentucky for the payment of taxes relating to Dog Island should and must be disregarded, apart from the total irrelevancy of these "facts" regarding the granting of a writ of certiorari under the present status of the case. Even if such enforcement proceedings had been instituted, the stark fact remains that petitioners are still not deprived of due process, due to the present uncertainty of their tax liability to Illinois. In the event that the Illinois courts should ultimately determine the existence of such a tax liability, there is still no certainty whether Kentucky will then persist in its tax demands against petitioners, will not recognize Illinois' claim and judgment, or reach an under-

standing in the form of a compact with Illinois relating to Dog Island. All this is, of course, rankest speculation which points up the utter fallacy of petitioners' due process arguments.

B.

The Illinois Appellate Court Decision Is Clearly Correct and in Accordance with Well Established Legal Principles.

The decision of the Illinois Appellate Court is firmly supported by law and logic. Petitioners' reliance on *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 71 L.ed. 2d 139, 82 S.Ct. 199 (1961), is ill placed since that decision is totally inapposite and readily distinguishable from the instant case.

In *Western Union*, the Company, a New York corporation with its principal place of business in that state, held a substantial amount of money which was never disbursed because various persons had bought money orders in the Company's offices in Pennsylvania for the purpose of having the money transmitted to payees chiefly in other states; in some instances the money was never claimed either by the designated payee or the payor and, therefore, held by the Company. The Pennsylvania court rendered a judgment of escheat respecting these unclaimed funds; that judgment was set aside by this Court as being violative of the constitutional due process provisions since other states might and actually did claim the same funds under their respective escheat statutes and thereby force the Company to pay a single debt more than once.

In the first place, the *Western Union* decision dealt with **intangible property, involving multi-state transactions,** which by their very nature gave rise to legal relationships concerning a variety of states, such as "the state of residence of the payee, the state of the sender, the state where

the money order was delivered, and the state where the fiscal agent on which the money was drawn . . . [was] located." (7 L.ed. 2d 139 at 143.) Thus multi-state contacts were implicit in these transactions and affected the funds which gave rise to these transactions. For one state, such as Pennsylvania, to ignore the character of these transactions and to assert and carry into final judicial effect an exclusive claim to the funds generated by these multi-state transactions was certainly legally improper. It became even more improper and constitutionally unacceptable, because one other state, namely New York, had been "particularly aggressive, not merely potential, but actual, active and persistent" in its claims for the very same moneys demanded by Pennsylvania, as shown by the fact that New York had "already escheated part of the very funds originally claimed by Pennsylvania." (7 L.ed.2d 139 at 143).

In contradistinction, the present case involves real estate—immobile property—located in a certain territory; it does not concern itself wih intangible property, having originated from multi-state transactions with all its attendant facets. Above all, the judgment of the Pennsylvania court in *Western Union* was final, ordering the escheat of the funds held by Western Union and directing the relinquishment of the property. No final judgment was rendered in the present case, no order issued directing petitioners to pay any Illinois taxes and thereby to relinquish any property. Moreover, unlike *Western Union*, according to the status of the record in the Illinois courts, no "actual, active and persistent" claim of the State of Kentucky to the real estate in question was ever made; the only semblance of a claim appeared in two letters of Kentucky officials, dated almost a month after the filing of the complaint, asking petitioners for the payment of taxes relating to the real estate because the property was

supposedly located in Kentucky. But the record in the Illinois courts is barren of any legal action taken by Kentucky to aggressively and persistently pursue its claim; neither is there any thing contained in the record which shows that petitioners have recognized Kentucky's claim. This is especially true in view of petitioners' new statement, made for the first time in their certiorari petition, that they had paid taxes to Kentucky during the pendency of the Illinois proceedings but then discontinued these payments. Thus, the inference previously made by respondents, seems justified that petitioners, under the guise of a pretended and conjectural due process violation, play off one state against the other and thereby avoid the payment of any taxes to either state.

Since Kentucky has not actively and aggressively pursued its claim to the property in question, the present case is more closely related to *Standard Oil Co* v. *State of New Jersey*, 341 U.S. 428, 95 L. Ed. 1078, 71 S. Ct. 822 (1951), cited by the Illinois Appellate Court, than *Western Union*. This Court distinguished *Western Union* from *Standard Oil*. In *Standard Oil* the company had appealed from a judgment of the New Jersey Supreme Court which had escheated to the state unclaimed stock certificates and undelivered dividends of the company. Standard Oil claimed in its appeal to this Court, among other things, that it was deprived of property without due process because the New Jersey escheat statute and judgment were "no protection beyond the state against owners of the escheated shares or against escheat or conservation actions by other states against Standard Oil of New Jersey for the same debts or demands due from Standard to its stockholders." (341 U.S. 428 at 442). Mr. Justice Reed, speaking for the majority of the Court, in affirming the New Jersey judgment tersely rejected that argument and

said that the claim of no other state to the property was before the United States Supreme Court, and determination of any right of a claimant state against New Jersey for the escheated property had to await presentation before the United States Supreme Court. (341 U.S. 428 at 443, 71 S.Ct. 822 at 831).

The case of *Worcester County Trust Co.* v. *Riley*, 302 U.S. 292, 82 L.ed. 268 (1937), offers a much better analogy than *Western Union*. In that case the executor under a decedent's last will which had been probated in Massachusetts filed an interpleader suit in the U. S. District Court in Massachusetts, joining as defendants Massachusetts and California state officials who had been entrusted with the duty administering death tax statutes in their respective states. The complaint alleged that decedent had left bank deposits and other intangibles in California and Massachusetts, a substantial part of which had come into the petitioner's possession; that the California taxing officials had asserted that decedent at the time of death was domiciled in California and that under the law of that state the decendent's estate was subject to death taxes upon all his intangibles; that the Massachusetts Commissioner, in behalf of the state, asserted a similar claim that decedent at death was domiciled in Massachusetts, and that his estate was subject to taxes there upon all intangibles: that it was impossible in law and in fact for decedent to have been domiciled in both states at the time of death; and that the attempted collection of the tax was a threatened deprivation of property without due process of law and a denial of equal protection of the laws. The U. S. District Court issued a temporary injunction restraining defendants, until further order of the court, from taking any action to assess the tax. The Court

of Appeals reversed, holding, upon the motion of the California state officials filed in the trial court, that the maintenance of the suit was an infringement of the Eleventh Amendment to the U. S. Constitution.

This Court affirmed the judgment of the Court of Appeals, and, in doing so, emphasized that although the complaint stated that the California officials had "determined" that decedent was domiciled in California, it was not contended that they had assumed authority to assess the tax, "independently of the judgment of a court." (302 U.S. 292 at 298, 82 L.ed. 268 at 274.) The Court then, speaking through Mr. Justice Stone, made the following characteristic statement, equally applicable to the instant case (302 U.S. 292 at 298, 299, 82 L.ed. 268 at 275):

> Petitioner's real concern is that the judgment of the California court, if it should decide that defendant was domiciled there, may be erroneous or may conflict with that of the Massachusetts courts. But conflicting decisions upon the same issue of fact do not necessarily connote erroneous judicial action. Differences in proof and the latitude necessarily allowed to the trier of fact in each case to weigh and draw inferences from evidence and to pass upon the credibility of witnesses, might lead an appellate court to conclude that in none is the judgment erroneous. **In any case the Constitution of the United States does not guarantee that the decisions of state courts shall be free from error** [cases cited], **or require that pronouncements shall be consistent.** [Cases cited]. **Neither the Fourteenth Amendment nor the full faith and credit clause requires uniformity in the decisions of the courts of different states as to the place of domicil, where the exertion of state power is dependent upon domicil within its boundaries.** [Cases cited]. **Hence it cannot be said that the threatened action of respondents involves any breach of state law or of**

the laws or Constitution of the United States [Emphasis supplied.]

In the present case, too, there is merely an assertion on the part of Kentucky officials that they would claim the payment of taxes for petitioners. There is no judgment of either a Kentucky court or any other court in existence that the land in question upon the location of which the validity of the taxes depends, is situated in Kentucky. Under these circumstances the Illinois courts have the perfect right, nay the duty, to proceed with the lawsuit and to ascertain the location of the property. Just as the determination of the decedent's domicile in the *Worcester County Trust Company* case could properly be left to the court of the state in which the decedent was allegedly domiciled, so may the Illinois courts, appropriately and lawfully, ascertain the location of the real estate, upon which the exertion of the Illinois state power depends; in doing so they infringe in no way upon the constitutional due process provisions.

Petitioners' attempt to denigrate the importance of the case of *Durfee* v. *Duke*, 375 U.S. 106, 11 L.ed. 2d 186, 84 S.Ct. 242 (1963), relied upon by the Illinois Appellate Court, for the resolution of the present controversy is indeed ill conceived. *Durfee* constitutes clear-cut authority that a state court has the power to determine the fact of the location of real estate within its boundaries in the face of defendant's claim that the property is located in a neighboring state and hence that the court lacks the jurisdictional power to proceed in the case. The fact that the *Durfee* case involved a dispute between two non-sovereign litigants is totally immaterial as far as the question of judicial power is concerned which is the basic underlying issue of the present dispute. Equally spurious is petitioners' argument that in *Durfee* all claimants of interest were

before the Nebraska Court while this is supposedly not true in the present case since Kentucky was not before the Illinois Court. In the first place Kentucky is not a claimant in interest, having never actively and aggressively asserted and pursued a claim to the property in question; the only claim in that respect was put forth by petitioners, just as the defendant in the *Durfee* case made the claim that the property was located in Missouri. Moreover, when the defendant in the *Durfee* case advanced the claim that the property which was the subject matter of the dispute was located in Missouri, certainly Missouri had more than an abstract interest in the outcome of the litigation; but that interest was, as this Court recognized, not sufficient to deprive the Nebraska court of the power to determine the jurisdictional fact of the location of the property upon which the exercise of the court's and thereby the state's authority depended, and, after a proper finding, to proceed with the resolution of the controversy.

Petitioners' argument that the present case, in distinction to *Durfee*, involves a dispute between Illinois, Kentucky, and petitioners, is simply not true. As repeatedly emphasized, based on the record, Kentucky is not a claimant in interest, and has not made an active, aggressive claim to the property. Only respondents and petitioners are involved in the present controversy.

Equally inapposite is petitioners' reference to *Texas* v. *Florida*, 306 U.S. 399 (1939). This Court did not exercise original jurisdiction because of a claim of due process violation; it asserted original jurisdiction solely because one sovereign state directly sued another in this Court and a substantial risk existed that the state of domicile would not get its tax claim satisfied because the estate to be taxed was insufficient. In the case at bar, there is, as re-

peatedly pointed out, no direct controversy between states.

In this connection it should be stressed that petitioners' reference to *Iowa* v. *Illinois*, 147 U.S. 1 (1892), and the inferences drawn therefrom, are ill at place since that case, unlike the present, involved a boundary dispute between two states, in which the boundary had not been determined.

CONCLUSION

Petitioners, in their brief, based in part upon "facts" not found in the record, attempt to obtain a writ of certiorari for the reason that they were allegedly deprived of property without due process of law. The record in this case manifests beyond any doubt that no deprivation of property has occurred, nor could it have occurred since there has never been a final judgment on the merits of the case. Thus petitioners' contentions are founded upon contrived hypothesis, conjecture, and inapplicable analogies, as well as basic misconceptions of the legal principles involved. For these reasons it is respectfully asked that the writ of certiorari sought by petitioners be denied.

Respectfully submitted,

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